MOTION FILED
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No. 82-131

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1982

JONES & LAUGHLIN STEEL CORPORATION
owner or owner pro hac vice of Barges 1011, 1384, 1400, 1363, and others in a fleet,
*Petitioner*

*v.*

HOWARD E. PFEIFER,
*Respondent*

## ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## MOTION OF ALCOA STEAMSHIP COMPANY, INC., ET AL. FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER

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## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Alcoa Steamship Company, Inc., American President Lines, Ltd., American Trading Transportation Co., Inc., Apex Marine Corp., Central Gulf Lines Inc., Delta Steamship Lines, Inc., Farrell Lines Incorporated, Hudson Waterways Corporation, Keystone Shipping Company, McAllister Brothers Inc., Newport Tankers Inc., Off-Shore Services Corporation, Ogden Marine Inc., Prudential Lines, Inc., Puerto Rico Marine Management, Inc., Sabine Towing & Transportation Co., Inc., Sea-Land Service, Inc., Seatrain Lines Inc., SunExport Inc., Sun Transport, Inc. and Trinidad Corporation hereby respectfully move for leave to file the attached brief amicus curiae in this case. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the respondent was requested but refused.

The interest of amici curiae in this case arises from their ownership and operation of many vessels engaged in interstate and foreign commerce and their exposure to personal injury actions subject to the rule of damages announced in *Pfeifer v. Jones & Laughlin Steel Corp.*, 678 F.2d 453 (3d Cir. 1982). The interests of amici curiae may not be represented properly before this Court due to the limited involvement of the petitioner and respondent in interstate and foreign commerce. By reason of their familiarity with the maritime law of the several federal jurisdictions through which the vessels of amici curiae pass in interstate commerce, amici curiae are qualified to present to this Court a thorough exposition of the far-reaching effects of the *Pfeifer* decision.

WHEREFORE, Alcoa Steamship Company, Inc., American President Lines, Ltd., American Trading Transportation Co., Inc., Apex Marine Corp., Central Gulf Lines Inc., Delta Steamship Lines, Inc., Farrell Lines Incorporated, Hudson Waterways Corporation,

Keystone Shipping Company, McAllister Brothers Inc., Newport Tankers Inc., Off-Shore Services Corporation, Ogden Marine Inc., Prudential Lines, Inc., Puerto Rico Marine Management, Inc., Sabine Towing & Transportation Co., Inc., Sea-Land Service, Inc., Seatrain Lines Inc., SunExport Inc., Sun Transport, Inc. and Trinidad Corporation respectfully request leave of this Court to file the attached brief amicus curiae.

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## INTEREST OF THE AMICI CURIAE

Alcoa Steamship Company, Inc., American President Lines, Ltd., American Trading Transportation Co., Inc., Apex Marine Corp., Central Gulf Lines Inc., Delta Steamship Lines, Inc., Farrell Lines Incorporated, Hudson Waterways Corporation, Keystone Shipping Company, McAllister Brothers Inc., Newport Tankers Inc., Off-Shore Services Corporation, Ogden Marine Inc., Prudential Lines, Inc., Puerto Rico Marine Management, Inc., Sabine Towing & Transportation Co., Inc., Sea-Land Service, Inc., Seatrain Lines Inc., SunExport Inc., Sun Transport, Inc. and Trinidad Corportion are United States flag shipowners and operators whose vessels represent a substantial portion of the United States merchant fleet. Amici Curiae represent the interests of vessel owners and operators who, because of their extensive involvement in interstate and foreign commerce, are directly affected by the decision of the United States Court of Appeals for the Third Circuit in *Pfeifer v. Jones & Laughlin Steel Corp.*, 678 F.2d 453 (3d Cir. 1982), as well as by decisions of other United States Courts of Appeal which are inconsistent with *Pfeifer*. Because of their relatively limited connection with maritime commerce, neither Petitioner nor Respondent can adequately protect the interests of the Amici.

Amici Curiae are vitally concerned with Question Two of this case. They are continually faced with many claims and lawsuits involving the Jones Act, the general maritime law, the Longshoremen's and Harbor Workers' Compensation Act, and the Death on the High Seas Act. If the opinion of the Third Circuit in *Pfeifer* is allowed to stand, and the total offset method is applied to cases brought under the general maritime law and the statutes mentioned above, Amici Curiae's exposure for such death and injury claims will increase by many millions of dollars in future years.

It is the position of Amici Curiae that the judgment of the United States Court of Appeals for the Third Circuit in *Pfeifer v. Jones & Laughlin Steel Corp.* should be reversed.

## SUMMARY OF ARGUMENT

This Court should reverse the Court of Appeals' decision in *Pfeifer v. Jones & Laughlin Steel Corp.*, 678 F.2d 453 (3d Cir. 1982) which adopted the total offset method of treating future loss of wages in maritime and FELA death and personal injury actions. Briefly, the total offset method presumes the rate of inflation to be equal to the discount rate and the one cancels the other, thereby precluding evidence of either factor. The ruling in *Pfeifer* is contrary to the express holdings of this Court in *Norfolk and Western Ry. Co. v. Liepelt*, 444 U.S. 490 (1980) and *Chesapeake & Ohio Ry. Co. v. Kelly*, 241 U.S. 485 (1916) which require reduction to present worth.

Evidence of inflation is too speculative for a charge to a fact-finder and should not be considered when calculating future loss of earnings. Strict adherence to the holdings in *Kelly* and *Liepelt* should be required.

If this Court decides that inflation will always be with us and decides to incorporate inflation into the determination of future loss of wages, then future losses should be determined on the basis of the national average weekly wage and the interest rate prevailing at the time and place of trial. The use of the national average weekly wage will provide for nationwide uniformity and the use of the interest rate at the time and place of trial will best suit the needs of the claimants and involved industries.

The total offset method is not only contrary to the holdings of this Court in *Liepelt* and *Kelly*, but runs afoul of the statutes involved, in that it goes beyond the loss of pecuniary benefits standard set forth in the Jones Act

and the Federal Employers' Liability Act by conferring excess monetary benefits on plaintiffs. This Court should reaffirm its holdings in the *Liepelt* and *Kelly* cases, but if inflation is to be a factor for consideration then this Court should articulate a rule for determining future loss of wages based upon the national average weekly wage and the prevailing interest rate at the time and place of trial.

## ARGUMENT

### I. This Court Should Reaffirm the Continuing Vitality of the Federal Rule Requiring Reduction of Future Damages to Present Worth.

A. *The Decision in Kelly*

The federal rule requiring reduction to present worth laid down in *Chesapeake & Ohio Ry. Co. v. Kelly*, 241 U.S. 485 (1916), was recently affirmed by this Court in *Norfolk & Western Ry. Co. v. Liepelt*, 444 U.S. 490 (1980). In *Kelly*, a death action, suit was filed pursuant to the Federal Employers' Liability Act (FELA) of April 22, 1908, 45 U.S.C. §51 *et seq*. On review by writ of error, this Court addressed the trial court's instructions with respect to computation of damages. Of significance, the trial court rejected a request for charge submitted by the defendant which would have directed the jury to "fix the damages at a sum which represents the present cash value of the reasonable expectation of pecuniary advantage." *See Kelly, supra*, 241 U.S. at 488. This Court reversed the Kentucky state courts for failing to instruct the jury to reduce the damage award to present value.

The *Kelly* Court carefully limited its decision by declining "to lay down a precise rule or formula." *Id*. at 491. Instead, the Court indicated several considerations for use as clarifying and guiding influences in future cases. Thus, local conditions were "not to be disregarded" in measuring the anticipated pecuniary benefit, nor was the discount rate to be tied unalterably to the " 'legal rate' of interest." *Id*. at 490. The compensation rate was to be computed on a reasonable basis not requiring the beneficiaries to exercise sophisticated financial acumen and skill. *Accord, Roselli v. Hellenic Lines, Ltd.*, 524 F.Supp. 2 (S.D.N.Y. 1980).

The *Kelly* rule has been followed uniformly in the state and federal courts since its pronouncement sixty-

six years ago. The principle of reducing future damages to present value has been the rule of law applicable not only to FELA cases but to maritime and non-maritime torts as well. In 1971, the Second Circuit recognized that the requirement of discounting future losses to present value in accordance with *Kelly* was in line with so many "familiar and controlling decisions" that extended citation in support of it became "supererogatory". *Yodice v. Koninklijke Nederlandsche Stoomboot Maatschappij*, 443 F.2d 76, 77-78 (2d Cir. 1971) (Friendly, J.), *cert. denied*, 411 U.S. 933 (1973). During the 1970's, as in years past, *Kelly* was routinely cited throughout the circuits as the general rule for cases arising under the FELA, the Jones Act, 46 U.S.C. §688, the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§901 *et seq.* (LHWCA), the Death on the High Seas Act, 46 U.S.C. §§761, 762 (DOHSA), and even the Federal Tort Claims Act, 28 U.S.C. §2671 *et seq.* (FTCA), in which damage awards are governed by state law. *See, e.g., Yodice, supra*, (LHWCA); *Dugas v. National Aircraft Corp.*, 438 F.2d 1386, 1396 (3d Cir. 1971) (DOHSA); *Downie v. United States Lines Co.*, 359 F.2d 344 (3d Cir.) (*en banc*), *cert. denied*, 385 U.S. 897 (1966) (Jones Act); *Murphy v. National Railroad Passenger Corp.*, 547 F.2d 816, 818 (4th Cir. 1977) (FELA); *Ivy v. Security Barge Lines*, 585 F.2d 732 (5th Cir. 1978), *modified on different grounds*, 606 F.2d 524, 529 (5th Cir. 1979), *cert. denied*, 446 U.S. 956 (1980) (Jones Act); *Blue v. Western Ry. Co. of Alabama*, 469 F.2d 487, 496 (5th Cir. 1972), *cert. denied*, 410 U.S. 956 (1973) (FELA); *Petition of United States Steel Corporation*, 436 F.2d 1256, 1280 (6th Cir. 1970), *cert. denied*, 402 U.S. 987 (1971) (Jones Act); *Sleeman v. Chesapeake & Ohio Ry. Co.*, 414 F.2d 305 (6th Cir. 1969) (FELA); *Beanland v. Chicago, Rock Island and Pacific R.R. Company*, 480 F.2d 109, 114-15 (8th Cir. 1973) (FELA); *Taenzler v. Burlington Northern*, 608 F.2d 796 (8th Cir. 1979) (FELA); *United States v. English*, 521 F.2d 63

(9th Cir. 1975) (FTCA); *Steckler v. United States*, 549 F.2d 1372 (10th Cir. 1977) (FTCA).

*Kelly* has not been cited merely as a matter of routine. Rather, the courts have demonstrated widespread acceptance of the reduction-to-present-value standard in years of recession, depression and subsequent inflation. The economic cycles attendant upon wartime and peacetime economies failed to generate substantive criticism of the principle that the "earning power of money" can be measured by the fact-finder in the calculation of future damages. The wisdom of the flexible standard established in *Kelly* was proven by its continuing vitality during the following decades, and was further underscored by the diverse application of the principle by the state courts in numerous legal contexts. *See, e.g., Watkins v. Ebach, et al.*, 291 N.W.2d 765 (S.D. 1980) (automobile personal injury action, collecting cases); *Thorpe v. Bailey*, 386 A.2d 668 (Del. 1978) (automobile personal injury, collecting cases); *Lumber Terminals Inc. v. Nowakowski*, 36 Md.App. 82, 373 A.2d 282 (Ct.Spec.App. 1977) (personal injury action, noting application of the rule in breach of contract matters in Maryland "since the turn of the century"); *Tenore v. Nu Car Carriers, Inc.*, 67 N.J. 466, 341 A.2d 613 (N.J. 1975) (wrongful death action, also discussing historic treatment of inflation by courts of several states); *Plourd v. Southern Pacific Transportation Co.*, 266 Or. 666, 513 P.2d 1140 (Or. 1973) (FELA, recognizing Oregon decisions requiring reduction to present value); *Resner v. Northern Pacific Ry.*, 161 Mont. 177, 505 P.2d 86 (Mont. 1973) (FELA); *Varney v. Taylor*, 77 N.M. 28, 419 P.2d 234 (N.M. 1966) (wrongful death); *St. Louis-San Francisco Ry. Co. v. Tompkins*, 409 P.2d 1 (Okla. 1965) (FELA, application of Oklahoma law); *Mallinger v. Brussow*, 252 Iowa 54, 105 N.W.2d 626 (Iowa 1960) (wrongful death); *Jacobsen v. Poland*, 163 Neb. 590, 80 N.W.2d 891 (Neb. 1957) (automobile accident, personal injury action); *Kellerher v. Porter*, 29 Wash.2d 650, 189

P.2d 223 (Wash. 1948) (automobile accident, death action).

The foregoing cases demonstrate that, historically, state and federal courts have consistently applied the principle of reducing future damages to present value as set forth in *Kelly*.

In recent years, several Circuit Courts of Appeal have examined the question of whether and in what manner juries should consider the impact of inflation on awards for future damages. With the sole exception of *Pfeifer*, every federal court considering inflation has adhered in theory and in practice to the *Kelly* rule. The error committed by the *Pfeifer* court, through its failure to apply in practice the *Kelly* rule, was further compounded by that court's failure to recognize that this Court reaffirmed *Kelly* in the recent decision of *Norfolk & Western Ry. Co. v. Liepelt*, 444 U.S. 490 (1980).

B. *This Court in Liepelt Recently Reaffirmed The Kelly Rule*

In 1980, this Court reaffirmed the continuing vitality of the *Kelly* rule as the governing standard for measuring damages in personal injury and death cases arising under federal law. In *Liepelt*, the Court was confronted with the question whether evidence of income taxes payable on a decedent's future estimated earnings should be admissible at trial. The Court held that income taxes payable on the decedent's past and estimated earnings must be considered in measuring the actual pecuniary loss to the wage earner's family. The Court stated that a wage earner's after-tax income "provides the only realistic measure of his ability to support his family" and therefore a "wage earner's income tax is a relevant factor in calculating the monetary loss suffered by his dependents when he dies." *Id.* at 493-94.

This Court reasoned that the taxability of a wage earner's estimated future earnings is a factor no more

speculative or complex for a jury's deliberations than other matters routinely accepted as evidence bearing upon the pecuniary loss to a decedent's dependents. *Id.* at 494. In support of this reasoning, the Court quoted *Chesapeake & Ohio v. Kelly* and said that "federal courts have consistently . . . required that the estimate of future earnings be reduced by 'taking account of the earning power of the money that is presently to be awarded,' *Chesapeake & Ohio Ry. Co. v. Kelly, supra*, 241 U.S., at 489, . . ." *Id.*

Thus, this Court expressly reaffirmed the *Kelly* mandate requiring reduction of awards for future loss of earnings to present worth in personal injury or death cases arising under federal law, a rule that has never been questioned by this Court. *See, e.g., Gulf, Colorado and Santa Fe R.R. Co. v. Moser*, 275 U.S. 133 (1927); *Western and Atlantic R.R. v. Hughes*, 278 U.S. 496 (1929). Indeed, in *Moser*, which was decided during a period of high inflation, this Court held that failure to instruct the jury in accordance with its language in *Kelly* and to require reduction of an award for future loss of earnings to present worth constituted grounds for reversal.

The matter of *Jones & Laughlin Steel Corp. v. Pfeifer* brings under review by this Court, for the first time since *Liepelt*, the manner in which the lower federal courts and several state courts have treated the calculation of future damages, inflation and interest rates. As will become self-evident, the course of judicial deliberations and pronouncements has been a diverse one, seldom following the same path among the several circuits.

## II. Evidence of Inflation Should Not Be Considered When Calculating Future Loss of Earnings.

The decision of the United States Court of Appeals for the Fifth Circuit in *Johnson v. Penrod Drilling Co.*,

469 F.2d 897 (5th Cir. 1972), *on rehearing*, 510 F.2d 234 (5th Cir.) (*en banc*), *cert. denied*, 423 U.S. 839 (1975) was a leading precedent prior to *Liepelt*.

In *Penrod*, the Fifth Circuit convened *en banc* to consider whether evidence of future inflation should be considered in a Jones Act case for the calculation of future damages. The Fifth Circuit took judicial notice that inflation had worsened since the initial panel opinion of November 1972, and recognized that inflation "could . . . become a predictable condition for the future." 510 F.2d at 236. The court continued:

> Nevertheless, with this added light, we still cannot so surely discern the shadow of inflation as a coming event as to warrant requiring its inclusion in a present rule for calculating future damages. The worsening of inflation might as readily foretell a recession or a depression as its continuity. Strong governmental counter-measures have been proposed and their efficacy is still unknown. Then too, if future inflation does cause higher taxes, experience predictably demonstrates that higher interest rates on investments which have always accompanied inflation will also occur and this factor will mitigate the failure to include an inflationary surcharge in wage rate calculations. *Id.*

The Fifth Circuit expressly disapproved the trial court's attempt to take into account, in computing the plaintiff's future loss of earnings, "inflationary trends in this nation's economy for the next several decades." *Id.* at 241. The *Penrod* court held that the influence on future damages of possible inflation or deflation is too speculative a matter for judicial determination. *Id.* Furthermore, the court ruled that the jury should be instructed to discount any award to present value in accordance with the decision of the United States Supreme Court in *Chesapeake & Ohio Ry. Co. v. Kelly*, *supra*. Thus, *Penrod* joined a significant number of federal

precedents which as recently as 1975 considered evidence of inflation too speculative for a fact-finder's consideration. *See, e.g., Williams v. United States*, 435 F.2d 804 (1st Cir. 1970); *McWeeney v. New York, New Haven and Hartford R.R. Co.*, 282 F.2d 34 (2d Cir.) (*en banc*), *cert. denied*, 364 U.S. 870 (1960); *Frankel v. United States*, 321 F.Supp. 1331 (E.D.Pa. 1970), *aff'd. sub nom. Frankel v. Heym*, 466 F.2d 1226 (3d Cir. 1972); *Magill v. Westinghouse Electric Corp.*, 464 F.2d 294 (3d Cir. 1972); *Sleeman v. Chesapeake & Ohio Ry. Co., supra; United States v. Furumizo*, 381 F.2d 965 (9th Cir. 1967).

The application of *Penrod* in subsequent cases in the Fifth Circuit resulted in the exclusion of evidence of future wage increases on the basis of merit or productivity, as well as any increases due to inflation. *See generally Culver v. Slater Boat Company*, 688 F.2d 280, 288-92 (5th Cir. 1982) (en banc). This unintended consequence of *Penrod* had the practical effect "to throw the baby of future merit increases out with the inflationary washtub waters." *Id.* at 290.

In *Culver*, the Fifth Circuit, rather than modifying the *Penrod* rule to permit evidence of productivity and merit increases with concomitant reduction to present worth, flatly overruled *Penrod's* prohibition of evidence of future inflation. Significantly, however, the *Culver* majority did not reject — nor could they have rejected — the underlying assumption of *Penrod*, i.e., that future inflation is undeniably a matter of pure speculation. Amici, therefore, submit that the underlying rationale of *Penrod* is still valid and should be adopted by this Court.

The view that future inflation is too speculative to be considered as a factor in awarding future wage losses is not without substantial support today. *Williams v. United States, supra*; *Culver v. Slater Boat Company, supra*, (Clark, Roney, Gee, JJ., dissenting); *Sleeman v. Chesapeake & Ohio Ry. Co., supra*; *Petition of United States Steel Corporation, supra*; *cf. Taenzler v.*

*Burlington Northern, supra; but see Bach v. Penn Central Transportation Co.*, 502 F.2d 1117 (6th Cir. 1974) (acknowledging that the testimony of the plaintiff's economist as to the existence and rate of inflation for the next 30 years was so speculative as to be inadmissible as evidence, but holding that the trial court erred in affirmatively instructing the jury not to consider future increases or decreases in the purchasing power of money).

In support of the *Penrod* rule, we urge this Court to take judicial notice of the fact that England, with its longer history of continued inflation, to this day refuses to consider evidence of inflation in the calculation of future damage awards. In the leading case of *Young v. Percival*, (1975) 1 W.L.R. 17, 1 Lloyd's Rep. 130, the court ruled that anticipated inflation could best be guarded against by the management and careful investment of the fund of damages awarded. Lord Pearson stated: "I think that protection against inflation is to be sought by investment policy, and that the lump sum of damages should be assessed on the basis that it will be invested with the aim of obtaining some capital appreciation to offset the probable rise in the cost of living." *Id.*; *see Cookson v. Knowles*, House of Lords (1979), 2 All E.R. 604. Furthermore, although pressed with scholarly evidence concerning the manner in which inflation could be placed before the finder of fact, English courts have observed that even if they were persuaded to depart from the principle that prevented introduction of such evidence, "we should be left with no firm or workable principle, or basis of calculation, to put in its place." *Id.*

Most recently in the matter of *Lim Poh Choo v. Camden and Islington Area Health Authority*, House of Lords (1980), 2 All E.R. 910 (1979), the court explained its rationale as follows:

> [T]he better course in the great majority of cases is to disregard [inflation]. And this for several reasons. First, it is pure speculation whether inflation will

> continue at present, or higher, rates, or even disappear. The only sure comment one may make on any financial prediction is that it is as likely to be falsified as to be borne out by the event. Secondly, as Lord Pearson said in *Taylor v. O'Connor* . . . inflation is best left to be dealt with by investment policy. It is not unrealistic in modern social conditions, nor is it unjust, to assume that the recipient of a large capital sum by way of damages will take advice as to its investment and use. Thirdly, it is inherent in a system of compensation by way of a lump sum immediately payable, and, I would think, just, that the sum be calculated at current money values, leaving the recipient in the same position as others, who have to rely on capital for their support to face the future. *Id.*

The inflation experienced in the United States is of more recent origin and has not been as severe as that in Great Britain, yet our federal courts have plunged headlong into "graduate seminars in economics" to predict the future course of inflation without consideration of the British experience. Furthermore, as Judge Gee has aptly observed, "Even the recent history of this young nation reveals that economic cycles come and go — oft times with dramatic, unpredicted swiftness." *Culver v. Slater Boat, supra,* at 314. Similarly, Judge Adams of the Third Circuit, dissenting from the denial of rehearing in *Pfeifer,* observed that "the presence at this time of very high interest rates and substantially reduced inflation would suggest caution in adopting a rule that appears to be premised on some immutable relationship between interest and inflation." *Pfeifer, supra,* 678 F.2d at 462 (Statement of Adams, J.).

Thus, the English courts have recognized the insurmountable difficulties of constructing and applying a rule of law to the vagaries of a national economy. In this country, several distinguished federal judges have ex-

pressed a similar reluctance to define and resolve complex economic problems through traditional jurisprudential analyses. These themes were echoed in the dissenting opinion of Judges Clark, Roney and Gee, who, in *Culver*, contended that *Penrod* represented the most workable "path to justice in jury trials of future damages cases." *Culver, supra*, 688 F.2d at 314. They wrote:

> What is overlooked or misunderstood in casting *Penrod* aside is that its use of the prevailing interest rates at the time and place of trial to discount present awards of future dollars works in terms of market-place realities. No one wins. No one loses. No one speculates. Under *Penrod* the plaintiff's future losses are based on fact, not speculation. The prevailing interest rate is not only simple to prove, but, because it is real and current, it is also available to the plaintiff for the investment of the funds he has received. The majority's speculation that it is not available is just that — speculation. Whatever factors (inflation, money supply and the like) that make the rate high or low for discount purposes are available for investment purposes. If it is not so, then the rate is not the true prevailing rate. *Id.*

In view of the foregoing, Amici respectfully urge this Court to recognize that future inflation is too speculative for competent determination by a fact-finder and to adopt a rule forbidding consideration of inflation as a factor in measuring future loss of earnings.

## III. If Inflation Is To Be a Factor, Then Future Losses Should Be Determined by the Application of the National Average Weekly Wage and the Interest Rate Prevailing at the Time and Place of Trial.

If inflation (cost of living increase) is to be considered at all in computing future wage losses, what is needed is a practical way fairly to allow for it, which is

simple and easy of application on a nationwide basis, and which eliminates as much of the speculation inherent in such computations as possible. This is graphically demonstrated by the *en banc* decision of the Former Court of Appeals for the Fifth Circuit in *Culver*,[1] which consists of some 43 pages of various and sundry methods which might be used to forecast future loss of wages attributable to both inflationary and non-inflationary (merit and productivity) factors. Of course, fairness to both plaintiffs and defendants is essential.

First of all, what is it we are trying to replace with a lump sum of money at the time of settlement or trial? It is the amount of wages which the plaintiff will not be able to earn each year for the balance of his work life expectancy because of the injury. We are not trying to replace what the wages he would have earned would not buy for him because of inflation. For example, in the 10 year period 1971-80, the national average weekly wage increased an average of 6.97% per year whereas inflation based on the Consumer Price Index increased an average of 7.87% per year. What a plaintiff loses as a result of an injury is the 6.97% increase in the wages he would have earned, and not the 7.87% inflation increase his wage increases did not equal.

We are trying to place in the plaintiff's hands a lump sum of money which he, as an unsophisticated investor, can invest in reasonably safe investments which will replace in each remaining year of his work life expectancy the wages he will not be able to earn because of his injury. The *Culver* court made this perfectly clear:

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1. The word "Former" is used to indicate the case was heard *en banc* by the Fifth Circuit before it was divided into the present Fifth and Eleventh Circuits on October 1, 1981. A total of twenty-two (22) Circuit Judges participated in the decision from which seven (7) judges dissented. Three (3) additional judges who joined the Fifth Circuit after submission and oral argument chose not to participate and one (1) additional judge was disqualified because he took senior status before the decision was rendered.

> The goal, albeit ideal, is that if the injured worker has a 20-year work-life expectancy, and he invests his lump-sum award in relatively risk-free investments, he will receive in the nineteenth and in the twentieth year roughly the same amount as if he had worked each of those years. The goal is not, it must be made clear at the outset, to *protect* the lump-sum award from the effect of inflation. 688 F.2d at 287.

Over the 33 years from 1948 through 1980 the average increase in the weekly wages of all private non-agricultrual industrial workers in the United States was 5.12% per year. As the *Culver* court recognized, this increase in wages obviously included all the factors that determine such increases, both the non-inflationary (merit and productivity) and inflationary. This one index affords a simple, practical approach to estimating potential future wage increases which is fair to both plaintiffs and defendants.[2] If the percentage increase in the national average weekly wage exceeds the percentage increase of inflation, the plaintiff is compensated on that basis. If it is less than the inflation rate, the defendant is not required to pay for the inflation which an employer would not have paid for had the plaintiff been working.[3]

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2. Congress has utilized such percentage national average weekly wage increases to increase weekly benefits payable under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. §910(f). The percentage increase is determined each year as of June 30, [33 U.S.C.A. §906(b)(3)] with increases to be effective on October 1 as no lump sum awards are involved under the Longshoremen's Act. The basic concept is the same, although the average increase over a longer period of time must be considered because of the lump sum awards which have to be made in third-party actions.

3. In fact, using the percentage increase in the national average weekly wage of 5.12% is more favorable to the plaintiff, because the increase in the Consumer Price Index (inflation) was only 4.05% over this same period of time.

From the many different approaches articulated and examined in *Culver*, Amici respectfully submit that the following simple and practical approach can be distilled:

1. Determine the annual amount of future wage loss at the time of settlement or trial without considering any potential wage increases in the future. (Assume $10,000.00).[4]
2. Determine from the latest Department of Labor statistics the work-life expectancy of the plaintiff. (Assume 18 years).
3. Determine from the latest Department of Labor statistics the average annual percentage wage increase nationally of all private non-agricultural industrial workers for the same period of years prior to settlement or trial as remains in his work-life expectancy found in Step 1. (Assume 5.12%)
4. Determine the percentage interest rate at which the lump sum award can be invested at the time and place of settlement or trial in substantially risk free investments, such as U.S. Treasury bonds, the interest rate for which is obtainable from the daily newspapers in most large cities. (Assume 10%).
5. Subtract the annual percentage wage increase found in Step 3 from the percentage interest rate found in Step 4. (10% minus 5.12% = 4.88%).
6. The net percentage rate found in Step 5 is the rate at which the projected annual loss of wages found in Step 1 is to be discounted to obtain the present value of the future wage losses to be paid in a lump sum at the time and place of settlement or trial. [$10,000.00 (Step 1) for 18 years (Step 2) discounted at 4.88% (Step 5) has a

4. For illustrative purposes, we are assuming the figures are the same as the figures used by the Fifth Circuit in *Culver*, footnote 49, 688 F.2d at 310.

present value of $117,999.59, which is the substantial equivalent of the $114,232.99 present value figure arrived at by the more complicated calculation in footnote 49, in *Culver*, 688 F.2d at 310].

This is basically a combination of the two methods summarized by the court in *Culver*, 688 F.2d at 308-310, which Amici believe eliminates the unfairness in the Fifth Circuit's two summarized methods and in the total offset method (Alaska rule) adopted by the Court of Appeals below in this case.

Using the first method suggested by the Fifth Circuit, and its figures in footnote 49, the projected loss of earnings for the 18 years totals $284,494.17 which divided by 18 years equals $15,805.23 as the average annual wage loss for each of the 18 years. Discounted at the 10% rate used in footnote 49, the present value lump sum award would be $129,625.20. This is $15,392.21 more than the present value when the 10% discount rate is applied to each year as was done in the calculation in footnote 49.[5]

Under the second method approved by the *Culver* court, the so-called *Feldman* approach, after segregating potential future wage increases based on non-inflationary factors (merit and productivity) from the potential wage increases based on inflationary factors (688 F.2d at 310, Step 5)[6], the future wage loss for each year without inflation is projected and then discounted by the inflation-adjusted discount rate. For these purposes we will

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5. This difference becomes even greater as the number of years of work life expectancy increases. For 25 years, the average annual income is $19,409.73, which discounted at 10% for 25 years has a present value of $176,182.13 which is $37,272.34 more than the present value would be if it is computed as in footnote 49. For 30 years the average annual income is $22,608.10, which discounted at 10% for 30 years has a present value of $212,968.30 which is $60,715.89 more than if it is computed as in footnote 49.

6. One of the strongest reasons the Fifth Circuit articulated for overruling *Penrod* was the inability or impracticability of separating

assume this is 2%, which is approximately what most courts who have looked at it have found it to be.[7] In order to be able to use the figures from footnote 49 for illustrative purposes, let us assume the 5.12% annual increase in wages did not include any amount for inflation and represented only merit or productivity. Under the *Feldman* approach, the inflation adjusted discount rate would be 2% of plaintiff's total loss of future earnings of $284,494.26 which discounted at 2% for 18 years would

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wage increases into inflationary and non-inflationary amounts. The court said:

> . . . although *Penrod* was not intended to eliminate evidence of future wage increases on the basis of merit or productivity, the practical effect of *Penrod* is often to throw the baby of future merit increases out with the inflationary washtub waters. 688 F.2d at 291.
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> . . .an employer may take into account rising inflation in his decision to grant promotions, and it would be impossible for anyone, expert or otherwise, to distinguish that part due to merit *only* and determine the percentage amount of the raise due wholly to non-inflationary factors. 688 F.2d at 292.

The Fifth Circuit does not explain why something that was "impossible"under their *Penrod* decision, suddenly becomes possible by labeling it a part of their *Feldman* approach. 688 F.2d at 310, Step (5).

7. In arriving at this discount rate, *Culver* provides for the full inflationary percentage rate for each of the 40 years from 1940-1980 to be subtracted from the effective interest rate on some safe investment for each of those years to establish a "real rate of interest" for each year. These yearly "real rates of interest" are averaged to obtain the inflation adjusted discount rate. 688 F.2d at 309-310, Steps 1 through 4. Using the full inflationary percentage rate in this way is directly contrary to *Culver's* holding that ". . . the goal is not . . . to *protect* the lump-sum award from the effect of inflation. . . ." 688 F.2d at 287. Despite this unequivocal holding, *Culver* requires the full effect of inflation to be used in its *Feldman* approach in arriving at the inflation adjusted discount rate, which protects in full the lump-sum award from inflation, the very goal or result the Fifth Circuit had condemned earlier in its decision.

have a present value of $230,740.55. This is $116,507.56[8] more than the present value computed in footnote 49, which footnote is supposed to be "essentially a variation of the *Feldman* approach."[9]

The basic problem with the *Feldman* inflation adjusted discount rate is the underlying assumption that the lump sum awarded will be re-invested over the plaintiff's work life expectancy from time to time as interest rates go up or down with inflation. This is not the case; the interest rate which the lump sum award can earn over the assumed 18 year work-life expectancy of the plaintiff is that which exists at the time and place of settlement or trial and which will produce the wages which the plaintiff otherwise would have earned in each of the following 18 years. For example, for the 18th year the income needed to be replaced as projected in footnote 49 is $23,369.58. By investing its present value of $4,183.15 at the assumed 10% interest rate at the time and place of settlement or trial, the desired $23,369.58 will be available in the 18th year and the plaintiff has never had to change his investment. What happens to interest rates over the next 18 years is of no consequence.

*Feldman* is also substantially flawed, just as the Fifth Circuit held *Penrod* was, because it requires a sep-

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8. See Addendum A to this brief for the computations.

9. If we assume 3% of the average annual increase in wages of 5.12% from footnote 49 is for non-inflationary factors and 2.12% for inflationary factors, the projected future wage loss totals $231,144.30 for the 18 years. Discounted at the *Feldman* inflation adjusted discount rate of 2%, the present value of these future wage losses is $191,946.77 which is $77,713.78 more than the present value as computed in footnote 49 for wage losses totaling $284,494.17. (See Addendum B to this brief which contains these computations). The Fifth Circuit condemns the total offset method (Alaska rule) of the Court of Appeals below as unfair because it "unnecessarily penalizes defendants", 688 F.2d at 299. Here the *Feldman* rule aproved by the Fifth Circuit penalizes the defendant an additional $11,946.77.

aration of anticipated future wage increases based on non-inflationary factors from those which may result from inflation.[10] Amici's proposed method does not require this, but combines in a single percentage figure anticipated wage increases which include all relevant factors, both inflationary and non-inflationary. Since this method is based on Department of Labor statistics, it is easily ascertainable, as is the interest rate at the time and place of settlement or trial. With this type of certainty, the principal objectives of the Court of Appeals below in adopting the total offset method are fully met inasmuch as Amici's method also

> . . . will tend to eliminate the necessity for speculation, to introduce greater certainty into the parties' own calculations, and thereby perhaps to facilitate settlement of personal injury claims without the necessity of judicial intervention . . . 678 F.2d 453, at 461.

The unfairness of the total offset method of the Court below is dramatically demonstrated by referring once again to footnote 49 in *Culver*, 688 F.2d at 310. Under the total offset method, the plaintiff would receive $180,000.00 for his loss of future wages, or $65,767.01 more than the present value of his projected future wage losses over the next 18 years. By investing the full $180,000.00 when he receives it at 10%, plaintiff will have an average of $21,947.44 to spend in each of the 18 years.[11] This will produce total compensation for his lost wages of $395,053.92, which on the facts assumed in footnote 49 is $110,559.75 (38.9%) more than his actual projected loss of wages of $284,494.17. Stated another way, if we assume the same 5.12% wage increase from

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10. See footnote 6, *supra*.

11. Note that under this method, the plaintiff will be awarded for each of the first fifteen years, the same amount that it is projected he would not have earned until the 16th year.

footnote 49, the $180,000.00 payable under the total offset method is enough when invested at 10% to pay the $10,000.00 base wages lost, with the 5.12% yearly increase for nearly 47 years, not for just the 18 years of lost wages which footnote 49 seeks to replace. It should be noted the amount of money received from the $180,000.00 over this 47 year period totals $1,846,150.29, which is more than six times as much as the lost wages of $284,494.17 sought to be replaced in footnote 49.[12]

Amici respectfully submit that their proposed method of calculating future wage increases resulting from both inflationary and non-inflationary factors and reducing the future losses to present value should be adopted because:

1. It is fair to both plaintiffs and defendants.
2. It eliminates speculation to the maximum extent possible.
3. It is simple and easy in its application.
4. It facilitates settlement inasmuch as the calculation of future lost wages is more certain.
5. By utilizing the net discount figure only one mathematical computation is needed [$10,000.00 per year (Step 1) for 18 years (Step 2) discounted at the rate of 4.88% (Step 5) equals $117,999.59].[13]

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12. See Addendum C to this brief in which the computations from footnote 49 are repeated for the first 18 years and then extended on the same basis through the 47th year. As the dollar amounts generated by the $65,767.01 difference between the present value figure in footnote 49 ($114,232.99) and total offset figure ($180,000.00) are staggering indeed, counsel for Amici have had their accuracy confirmed by an independent expert.

13. Please note the present value figure of $117,999.59 obtained using the Amici's method is substantially the same as the $114,232.99 present value figure obtained by the Fifth Circuit in its much more complicated method in footnote 49.

6. In most cases, experienced trial lawyers will be able to agree on the net percentage discount to be used (Step 5), if a case has to be tried.
7. It eliminates the need for the complicated expert economic testimony which is required by the other methods suggested by various courts.

## IV. The Total Offset Rule Adopted by the Third Circuit in Pfeifer Should be Rejected by this Court.

Those Circuit Courts of Appeal permitting consideration of future inflation in awards for future damages have not adopted satisfactory methods which distinguish between future wage increases due solely to inflation and those which may or may not occur for reasons independent of inflation. This variance in methods leads to inconsistent results which tend to overcompensate the plaintiff at the expense of the defendant. Amici submit that any method of predicting future loss of earnings which assumes that future wages will rise or fall in direct proportion to a change in the estimated inflation rate is erroneous. A review of the methods adopted by those circuit courts which consider inflation supports the foregoing view.

In *Doca v. Marina Mercante Nicaraguense, S.A.*, 634 F.2d 30 (2d Cir. 1980), *cert. denied*, 451 U.S. 971 (1981), the Second Circuit adopted the inflation adjusted discount rate as set forth by Judge Blumenfeld in *Feldman v. Allegheny Airlines, Inc.*, 382 F.Supp. 1271 (D. Conn. 1979), *aff'd in part, rev'd in part and remanded*, 524 F.2d 384 (2d Cir. 1975). This rate is determined by subtracting the average annual change in the consumer price index over each of several periods of years from the effective annual rate on government bonds held during each of the same periods, yielding a difference which is the "inflation-adjusted discount rate." Although this method may account for the anticipated effects of future inflation, it erroneously assumes

that future wages will increase in response to and proportionately with the estimated rate of future inflation.

Similarly, in *O'Shea v. Riverway Towing Co.*, 677 F.2d 1194 (7th Cir. 1982), the Seventh Circuit recognized that there is an inflation adjusted discount rate which approximates the "real rate of interest" in an inflationless world. Although the Seventh Circuit did not prescribe a method for calculating the adjusted future interest rate, Judge Posner suggested that expert evidence, fairly treating the inflationary impact of both future wage increases and future interest rates, should be considered by a jury so long as the result is not unreasonable. 677 F.2d at 1201. However, this approach again assumes that future wage increases will respond directly to estimated future increases in inflation.

We submit that a similar error occurred in *United States v. English*, 521 F.2d 63 (9th Cir. 1975). There, the Ninth Circuit approved a method of considering future inflation whereby a jury would be permitted to hear evidence of estimated future earnings including "postulated changes in the purchasing power of the dollar". 521 F.2d at 76. The court held that the jury likewise should consider evidence of the present value of future loss of earnings. Once again, the *English* approach erroneously assumed that future lost wages would respond directly to estimated future inflation. The *English* approach was adopted by the Tenth Circuit Court of Appeals in *Steckler v. United States*, 549 F.2d 1372 (10th Cir. 1977).

In *Taenzler*, *supra*, the Eighth Circuit adopted a method by which evidence of future wages and future interest rates would be presented to the jury even though each factor may contain an inflationary component. The court would not permit evidence of a specific future inflation rate because it was speculative and could tend to confuse the jury. However, by permitting evidence of future wage losses which may contain an inflationary component, the court improperly permitted

consideration of future inflation which may not necessarily be reflected in future wage changes.

In sharp contrast to the foregoing cases, in *Bach v. Penn Central Transportation Co.*, 502 F.2d 1117 (6th Cir. 1974), the Sixth Circuit, while holding that future inflation was too speculative to be the subject of expert testimony, nevertheless adopted an approach for considering inflation in future damage awards by permitting jurors to apply their common knowledge of inflation in reaching a verdict. The court noted that an exorbitant verdict could be rectified by remittitur. This approach invites sheer speculation on the part of the jurors and the court impermissibly allows the fact-finder to make judgments not supported by the record. *Compare Liepelt, supra*, at 494 (where this Court indicated its preference for evidence of all elements of damages).

While the foregoing cases can be criticized on the basis that they did not properly distinguish between estimated future wage losses and estimated increases in inflation, the *Pfeifer* case represents a radical departure from any of the foregoing methods and contravenes established judicial norms.

The *Pfeifer* court, on the basis of an inadequate record, *ipse dixit*, ruled "that the rate of future inflation will be equivalent to future interest rates." *Pfeifer, supra*, 678 F.2d at 461. This rule is erroneous and must be rejected by this Court for the following reasons.

First, a number of courts have recognized the existence of a "real rate of interest" which "mirrors the rate of interest that lenders would charge in an inflationless society." *See Culver*, 688 F.2d at 295; *accord, Doca v. Marina Mercante Nicaraguense, S.A., supra*. The existence of a rate of interest independent of the pressures of inflation undergirds the rationale of the inflation adjusted discount rate. *See, e.g., Feldman v. Allegheny Airlines, Inc.*, 382 F. Supp. 1271 (D.Conn. 1974), *rev'd on other grounds*, 524 F.2d 384 (2d Cir. 1975); *Doca, supra*. If the theory which underlies the calculation of an inflation

adjusted discount rate is valid, then the foundation of the *Pfeifer* "total offset" rule is flawed. The Third Circuit, therefore, erred in its assumption that future interest rates will be totally offset by future inflation.

Secondly, the Third Circuit improperly announced a rule of law without the benefit of an adequate record. Those courts which have allowed evidence of inflation to be presented to the fact-finder have at least required that it be admitted upon a proper foundation. *See, e.g., United States v. English*, 521 F.2d 63 (9th Cir. 1975) (holding that the estimate of future inflation must be supported by competent evidence, and that the court may not assume that the discount rate and the inflation rate will net to zero); *Taenzler v. Burlington Northern*, 608 F.2d 796 (8th Cir. 1979) (allowing expert testimony which included indirect consideration of anticipated future inflation, but suggesting that such testimony could not properly predict future inflation at a specified rate); *Steckler v. United States*, 549 F.2d 1372 (10th Cir. 1977) (adopting the *English* standard); *O'Shea v. Riverway Towing Co.*, 677 F.2d 1194 (7th Cir. 1982) (allowing evidence of inflation provided that such evidence be applied consistently in choosing the discount rate and in estimating future damages); *Alma v. Manufacturers Hanover Trust Co.*, 684 F.2d 622 (9th Cir. 1982) (ruling that the discount rate is an evidentiary issue, and thus it is the responsibility of the parties to produce evidence of the appropriate rate).

The trial court record in *Pfeifer* is devoid of any evidence whatsoever relating to estimated future inflation or discount rates. The United States Court of Appeals for the Third Circuit had before it the testimony of precisely one witness who could talk dollars and cents: Randy A. Pingree, an employee of Jones & Laughlin, whose title was "Assistant Supervisor of Hourly Payroll". Mr. Pingree was neither an actuary nor an economist — he was a payroll clerk. While this witness was able to present testimony with respect to past cost of living ad-

justments awarded by Jones & Laughlin on a quarterly basis, he was unable to state whether such increases were based upon statistics issued by the Bureau of Labor, the Consumer Price Index, or otherwise. *See* trial transcript at pages 413-424.

What the United States Court of Appeals for the Third Circuit has done with the record of this case is plainly wrong: it has engaged in sophisticated economic fact finding, randomly applying selected economic theories and state common law, to decide a complex question of federal maritime law with economic and jurisprudential ramifications far beyond the geographic bounds of the Third Circuit.

In all of the foregoing cases, the *Kelly* rule requiring a reduction in future earnings to present value has consistently been recognized and applied. However, in *Pfeifer*, the Third Circuit Court of Appeals departed from this doctrine and "borrowed" the law of Pennsylvania as most recently pronounced by the Pennsylvania Supreme Court in *Kaczkowski v. Bolubasz*, 491 Pa. 561, 421 A.2d 1027 (Pa. 1980).[14] The Court below clearly erred in adopting Pennsylvania law to supply the method of computation of damage awards for future loss of wages in maritime personal injury and death cases in disregard of the established federal standards embodied in *Chesapeake & Ohio Ry. Co. v. Kelly, supra*, and recently reaffirmed in *Norfolk & Western Ry. Co. v. Liepelt, supra*.

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14. While the *Pfeifer* court "bid fealty" to the concept of reducing future earnings to present worth, 678 F.2d at 461, the "total offset method" adopted by the court under the Pennsylvania case of Kaczkowski v. Bolubasz cannot be meaningfully reconciled with *Kelly's* emphasis upon the earning power of money presently received. This analysis is supported by the Seventh Circuit's decision in O'Shea v. Riverway Towing Company, 677 F.2d 1194 (7th Cir. 1982), decided eleven days after *Pfeifer*. In that case, Judge Posner took judicial notice of the so-called "Fisher effect," which predicts that, while the "real" rate of interest remains constant, the nominal rate rises proportionally in response to the pressures of inflation. *See* I. Fisher, *The Theory of Interest*, 43 (1930); R. Posner, *Economic Analysis of Law*, 78-79 (1973).

In *Pfeifer* the court held that "the discount factor is presumed equal to and offset by the impact of inflation on the future economic value of the award." 678 F.2d at 461. Thus, *Pfeifer* effectively removed from the jury's consideration the well-settled principle of discounting future damages to present value. The Third Circuit compounded its error by improperly adopting state law to govern an important issue of federal law in contravention of established Supreme Court law. The *Pfeifer* decision is an ill-advised attempt to "simplify" calculation of damages in federal courts which undermines important principles of uniform federal law clearly stated in the *Kelly* and *Liepelt* decisions.

The *Culver* court observed that the Alaska-cum-*Pfeifer* rule unnecessarily penalizes defendants by its presumption that inflation is equal to the discount rate, thus requiring no expert testimony. 688 F.2d at 299, n. 26. Amici asks the same question of this Court as was raised by the *Culver* court: "How do judges know that much?" *Id.*

Perhaps the most serious error committed by the court below was its failure to recognize the need for national uniformity in the area of maritime personal injury and death cases. *See generally, Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970); M/V TUNGUS v. *Skovgard*, 358 U.S. 588, 601-02, 608-11 (1959) (Brennan, J., dissenting); *Pope and Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953); *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 215-16 (1917). *See Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 596, 601 (1974) (Powell, J., dissenting).

In *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920), this Court rejected a compensation scheme that subjected maritime employers to inconsistent liabilities dependent upon the individual compensation laws of the States. The rationale underlying the *Knickerbocker* decision applies with equal force to the case at bar. The *Pfeifer* personal injury action was filed pursuant to the

1972 amendments to the LHWCA. The framers of those amendments specifically intended that uniform federal law should apply in all actions arising under the Act:

> Finally, the committee does not intend that the negligence remedy authorized in the bill shall be applied differently in different ports depending on the law of the state in which the port may be located. The committee intends that legal questions which may arise in actions brought under these provisions of the law shall be determined as a matter of Federal law.

House Report No. 92-1441, reprinted in 1972 U.S.C.C.A.N. 4698 at 4705.

The Third Circuit decision in *Pfeifer v. Jones & Laughlin Steel Corporation* has deepened the conflicts among the U.S. Circuit Courts of Appeal concerning calculation of awards for future wage losses and will subject vessel operators to inconsistent liabilities depending on where in the United States they happen to trade, or if they are amenable to service of process in several judicial districts.

For all of the reasons stated above, Amici respectfully urge this Court to reverse the judgment of the United States Court of Appeals for the Third Circuit.

## CONCLUSION

The decision of the Court of Appeals for the Third Circuit in *Pfeifer* is in error because it failed to reduce future loss of earnings to present worth and is in conflict with the decision of this Court in *Kelly, supra*, and is in violation of the FELA and Jones Act in that it awarded plaintiff more than the pecuniary loss prescribed in both statutes. Amici urge at the same time that this Court reverses *Pfeifer* that it lay down a rule prohibiting evidence of inflation. Alternatively, if this Court recognizes that inflation must be taken into account in calculating future losses, then Amici urge the adoption of a rule based upon the national average weekly wage and the discount rate at the time and place of trial.

Respectfully submitted
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# APPENDIX TO BRIEF OF AMICI CURIAE

# ADDENDUM A

| *Year* | *Wage Increase 5.12% Per Year* | *Present Value Factor at 2%* | *Present Value* |
|---|---|---|---|
| 1 | 10,000.00 | .980 | 9,800.00 |
| 2 | 10,512.00 | .961 | 10,102.03 |
| 3 | 11,050.21 | .942 | 10,409.30 |
| 4 | 11,615.98 | .924 | 10,733.17 |
| 5 | 12,210.72 | .906 | 11,062.91 |
| 6 | 12,835.91 | .888 | 11,398.29 |
| 7 | 13,493.11 | .871 | 11,752.50 |
| 8 | 14,183.96 | .853 | 12,098.92 |
| 9 | 14,910.18 | .837 | 12,479.82 |
| 10 | 15,673.59 | .820 | 12,852.34 |
| 11 | 16,476.07 | .804 | 13,246.76 |
| 12 | 17,319.64 | .788 | 13,647.88 |
| 13 | 18,206.40 | .773 | 14,073.55 |
| 14 | 19,138.57 | .758 | 14,507.04 |
| 15 | 20,118.47 | .743 | 14,948.02 |
| 16 | 21,148.53 | .728 | 15,396.13 |
| 17 | 22,231.34 | .714 | 15,873.18 |
| 18 | 23,369.58 | .700 | 16,358.71 |
| Total | 284,494.26 | | 230,740.55 |

# ADDENDUM B

| *Year* | *Wage Increase 3% Per Year* | *Present Value Factor at 2%* | *Present Value* |
|---|---|---|---|
| 1 | 10,000.00 | .980 | 9,800.00 |
| 2 | 10,300.00 | .961 | 9,898.30 |
| 3 | 10,609.00 | .942 | 9,993.68 |
| 4 | 10,927.27 | .924 | 10,096.80 |
| 5 | 11,255.09 | .906 | 10,197.11 |
| 6 | 11,592.74 | .888 | 10,294.35 |
| 7 | 11,940.52 | .871 | 10,400.19 |
| 8 | 12,298.74 | .853 | 10,490.83 |
| 9 | 12,667.70 | .837 | 10,602.86 |
| 10 | 13,047.73 | .820 | 10,699.14 |
| 11 | 13,439.16 | .804 | 10,805.08 |
| 12 | 13,842.33 | .788 | 10,907.76 |
| 13 | 14,257.60 | .773 | 11,021.12 |
| 14 | 14,685.33 | .758 | 11,131.48 |
| 15 | 15,125.89 | .743 | 11,238.54 |
| 16 | 15,579.67 | .728 | 11,342.00 |
| 17 | 16,047.06 | .714 | 11,457.60 |
| 18 | 16,528.47 | .700 | 11,569.93 |
| Total | 231,144.30 | | 191,946.77 |

# ADDENDUM C

| *Year* | *Wage Increased 5.12% Per Year* | *Present Value Factor at 2%* | *Present Value* | *Present Value of $10,000 Per Year Discounted at 4.88%* |
|---|---|---|---|---|
| 1 | 10,000.00 | .909 | 9,090.00 | |
| 2 | 10,512.00 | .826 | 8,682.91 | |
| 3 | 11,050.21 | .751 | 8,298.70 | |
| 4 | 11,615.98 | .683 | 7,933.71 | |
| 5 | 12,210.72 | .620 | 7,570.65 | |
| 6 | 12,835.91 | .564 | 7,239.45 | |
| 7 | 13,493.11 | .513 | 6,921.97 | |
| 8 | 14,183.96 | .466 | 6,609.73 | |
| 9 | 14,910.18 | .424 | 6,321.92 | |
| 10 | 15,673.59 | .385 | 6,034.33 | |
| 11 | 16,476.07 | .350 | 5,766.62 | |
| 12 | 17,319.64 | .318 | 5,507.65 | |
| 13 | 18,206.40 | .289 | 5,261.65 | |
| 14 | 19,138.57 | .263 | 5,033.44 | |
| 15 | 20,118.47 | .239 | 4,808.31 | |
| 16 | 21,148.53 | .217 | 4,589.23 | |
| 17 | 22,231.34 | .197 | 4,379.57 | |
| 18 | 23,369.58 | .179 | 4,183.15 | |
| | $ 284,494.17 | | $114,232.99 | $117,999.59 |
| 19 | 24,566.10 | .164 | 4,028.84 | |
| 20 | 25,823.88 | .149 | 3,847.76 | |
| 21 | 27,146.06 | .135 | 3,664.72 | |
| 22 | 28,535.94 | .123 | 3,509.92 | |
| 23 | 29,996.98 | .112 | 3,359.66 | |
| 24 | 31,532.83 | .102 | 3,216.35 | |
| 25 | 33,147.31 | .092 | 3,049.55 | |
| | $ 485,243.27 | | $138,909.79 | $142,650.28 |
| 26 | 34,844.45 | .084 | 2,926.93 | |
| 27 | 36,628.49 | .076 | 2,783.77 | |
| 28 | 38,503.87 | .069 | 2,656.77 | |
| 29 | 40,475.27 | .063 | 2,549.94 | |
| 30 | 42,547.60 | .057 | 2,425.21 | |
| | $ 678,242.92 | | $152,252.41 | $155,849.87 |

| Year | Wage Increased 5.12% Per Year | Present Value Factor at 2% | Present Value | Present Value of $10,000 Per Year Discounted at 4.88% |
|---|---|---|---|---|
| 31 | 44,726.04 | .052 | 2,325.75 | |
| 32 | 47,016.01 | .047 | 2,209.75 | |
| 33 | 49,423.23 | .043 | 2,125.20 | |
| 34 | 51,953.70 | .039 | 2,026.19 | |
| 35 | 54,613.73 | .036 | 1,966.09 | |
| 36 | 57,409.95 | .032 | 1,837.12 | |
| 37 | 60,349.34 | .029 | 1,750.13 | |
| 38 | 63,439.23 | .027 | 1,712.86 | |
| 39 | 66,687.32 | .024 | 1,600.50 | |
| 40 | 70,101.71 | .022 | 1,542.24 | |
| 41 | 73,690.92 | .020 | 1,473.82 | |
| 42 | 77,463.90 | .018 | 1,394.35 | |
| 43 | 81,430.05 | .017 | 1,384.31 | |
| 44 | 85,599.27 | .015 | 1,283.99 | |
| 45 | 89,981.95 | .014 | 1,259.75 | |
| 46 | 94,589.03 | .012 | 1,135.07 | |
| 47 | 99,431.99 | .011 | 1,093.75 | |
| | $1,846,150.29 | | $180,373.28 | $183,089.51 |